Mailing Date: November 9, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	: : : : : : :	Citation No. 10-1075
v.		
DRAFTING ROOM AT SPRING HOUSE, INC. t/a Drafting Room 900 North Bethlehem Pike Spring House, PA 19477	: : : : :	License No. R-19117 LID 42084

Counsel for Licensee: (on appeal)
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O P I N I O N

Drafting Room at Spring House, Inc. ("Licensee") filed a petition to appeal *nunc pro tunc* from the Second Supplemental Order of Administrative Law Judge David L. Shenkle ("ALJ"), mailed April 20, 2011, wherein the ALJ

revoked the license because of Licensee's failure to pay a fine of two hundred dollars ($200.00) imposed at Citation No. 10-1075 ("the Citation").

On May 21, 2010, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") issued the Citation, charging Licensee with violating section 5.23(c) of the Pennsylvania Liquor Control Board ("Board") Regulations [40 Pa. Code § 5.23(c)] in that between October 6, 2008, and January 13, 2010, Licensee, by its servants, agents or employees, failed to notify the Board within fifteen (15) days of a change of manager.

On September 27, 2010, Licensee submitted an Admission, Waiver and Authorization ("Waiver") to the Office of the Administrative Law Judge ("OALJ"), in which Licensee admitted to the violation charged in the Citation and, *inter alia*, waived a right to appeal the adjudication. The Waiver was signed by Andrew Weintraub, Licensee's president, on September 21, 2010.

The ALJ's Order and Adjudication, mailed to the licensed premises via first-class and certified mail on November 23, 2010, imposed a fine of two hundred dollars ($200.00) to be paid within twenty (20) days of the mailing date. The Order and Adjudication further notified Licensee that failure to pay the fine within twenty (20) days would result in suspension or revocation of the license.

On November 29, 2010, the OALJ received both the certified mailing, marked unclaimed, and the first-class mailing, marked not deliverable as addressed. The OALJ also mailed the Opinion and Adjudication to the address of record for Mr. Weintraub on December 15, 2010, via certified mail. The mailing was returned to the OALJ on January 10, 2011, marked unclaimed.

The twenty (20)-day deadline having long passed, the ALJ's Supplemental Order, mailed to the licensed premises via first-class and certified mail on February 23, 2011, ordered suspension of the license for one (1) day and continuing thereafter until further notice.[1] The Supplemental Order notified Licensee that if after sixty (60) days the fine remained unpaid, the ALJ would impose further sanctions including possible revocation of the license.

The certified mailing was returned to the OALJ, marked unclaimed, on February 28, 2011, and the first-class mailing, marked not deliverable as addressed, was returned on March 3, 2011. The OALJ also mailed the Supplemental Order to the address of record for Mr. Weintraub on March 4, 2011, via certified mail. The return receipt card was signed by Melanie Toth on March 7, 2011.

[1] The suspension period was deferred pending renewal of the license.

After prolonged nonpayment of the fine, the ALJ by Second Supplemental Order mailed to the licensed premises via first-class and certified mail on April 20, 2011, revoked the license effective June 13, 2011, but Licensee was notified that the decision would be reconsidered if Licensee paid the fine before the effective date of the revocation.

The first-class mailing was returned to the OALJ, marked not deliverable as addressed, on April 27, 2011, and the certified mailing, marked unclaimed, was returned on April 29, 2011. The OALJ also mailed the Second Supplemental Order to the address of record for Mr. Weintraub on May 6, 2011, via certified mail. The return receipt card was signed by Ms. Toth on May 9, 2011.[2]

Shilpa P. Kharva, Esquire, filed the instant appeal *nunc pro tunc* on behalf of Licensee on October 5, 2011. In its Petition to Appeal *Nunc Pro Tunc*, Licensee explains that it closed the licensed premises in April 2010, after its president, Mr. Weintraub, was charged with failure to remit sales taxes and failure to file required returns in January 2010. Licensee asserts that it "reasonably believed that all matters related to the [license] were encompassed within the [c]riminal [c]ase and no separate issues needed to be addressed." [Appeal para. 10]. Also, Licensee contends that it was unaware

[2] Licensee paid the fine of two hundred dollars ($200.00) on September 6, 2011. [Admin. Notice].

that a fine was assessed in connection with the Citation. [Appeal para. 9]. Licensee states that it did not learn of the outstanding fine and the revocation of the license until August 25, 2011. [Appeal para. 8].

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for appeals from an ALJ decision. [47 P.S. § 4-471(b)]. Further, section 17.21 of the Board's Regulations provides that failure to file or have the appeal postmarked within thirty (30) calendar days will result in dismissal of the appeal. [40 Pa. Code § 17.21(b)(2)]. The Supreme Court of Pennsylvania has held that the time for taking an appeal cannot be extended as a matter of grace or mere indulgence. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); In re: Dixon's Estate, 443 Pa. 303, 279 A.2d 39 (1971). Extension of the time of filing an appeal should be limited to cases where "there is fraud [or] some breakdown in the court's operation" caused by extraordinary circumstances. West Penn Power Co., 333 A.2d at 912. The negligence of an appellant, or an appellant's counsel, or an agent of appellant's counsel, has not been considered a sufficient excuse for the failure to file a timely appeal. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979).

The rule set forth in Bass was further clarified in Cook v. Unemployment Compensation Board of Review, 671 A.2d 1130 (Pa. 1996). Specifically, a delay in

filing an appeal is only excusable if: (1) it was caused by extraordinary circumstances involving fraud or breakdown in the court's operation or non-negligent conduct of the appellant, appellant's attorney or his/her staff; (2) the appeal is filed within a short time after appellant or his counsel learns of and has the opportunity to address the untimeliness; (3) the time period which elapses is of very short duration; and (4) appellee is not prejudiced by the delay. Id. at 1131.

The heavy burden of establishing the right to have an untimely appeal rests with the moving party. Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). Additionally, the filing of a timely appeal is a jurisdictional requirement that must be met before any appeal may be considered. Criss v. Wise, 781 A.2d 1156 (Pa. 2001); Morrisons Cove Home v. Blair County Bd. of Assessment Appeals, 764 A.2d 90 (Pa. Cmwlth. 2000).

In the instant case, Licensee's petition fails to set forth any allegations of fraud, a breakdown in the administrative process, or non-negligent circumstances that would satisfy the first prong of the Cook analysis. Licensee paid the fine relative to the Citation more than nine (9) months after the Order and Adjudication. As a result of Licensee's continued failure to make payment,

the ALJ, pursuant to his statutory duty[3], revoked the license effective June 13, 2011. Licensee's petition to appeal *nunc pro tunc* was filed more than five (5) months after the ALJ's Second Supplemental Order revoking the license, and more than three (3) months after the effective date of the revocation.

Licensee argues that it missed the various deadlines because its president was under the belief that all matters pertaining to the license, including resolution of the Citation, were encompassed within the criminal case against him; however, the record contains no evidence to justify that mistaken belief. Licensee submitted the Waiver, signed by Mr. Weintraub, on September 27, 2010. The Waiver authorized the ALJ to enter an adjudication based on a summary of facts and Licensee's prior adjudication history, and it listed the penalties authorized by law. Licensee was clearly on notice that a penalty relative to the Citation was forthcoming. Labeling Mr. Weintraub's belief that his personal criminal matter encompassed Licensee's Citation as "reasonable," as Licensee does in paragraph 10 of its petition, does not make the conduct non-negligent.

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[3] Section 471 provides:

> [I]f satisfied that [a] violation has occurred or for other sufficient cause, the administrative law judge shall immediately suspend or revoke the license, or impose a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000), or both, notifying the licensee by registered letter addressed to his licensed premises. . . . In the event the fine is not paid within twenty [20] days of the adjudication, the administrative law judge shall suspend or revoke the license, notifying the licensee by registered mail addressed to the licensed premises. [47 P.S. § 4-471(b)].

Furthermore, there is no evidence of an administrative breakdown on the part of the OALJ. The OALJ took the appropriate steps, by law, to send the Order and Adjudication and both supplemental orders to the licensed premises. If Licensee asserts it never received the OALJ's mailings, such a claim is without merit. Licensee did not provide an alternative mailing address to the Board or the OALJ, despite knowing that the ALJ's adjudication was forthcoming after Licensee submitted the Waiver.

Even assuming there was a non-negligent reason for Licensee's untimely payment of the fine and filing of its appeal, Licensee failed to establish the second prong of the Cook analysis. Licensee concedes in its petition to a delay of approximately forty-one (41) days between the time it learned of the revocation and the day the appeal was filed. Clearly, Licensee did not take action within a short time after learning of the untimeliness.

Furthermore, even if Licensee had satisfied the requirements for allowing an appeal *nunc pro tunc*, the Board would conclude that imposition of the penalty of revocation was not an abuse of discretion. Section 471 of the Liquor Code [47 P.S. § 4-471] authorizes administrative law judges to impose a fine, or suspend or revoke a license upon determining that a violation of the Liquor Code or the Board's Regulations has occurred. The imposition of

penalties is the exclusive prerogative of the administrative law judge. The Board may not disturb penalties imposed by an administrative law judge if they are within the parameters set forth in section 471 of the Liquor Code [47 P.S. § 4-471].

Under the circumstances, the Board is without authority to entertain Licensee's appeal because it was not filed within the statutorily-prescribed time limit of thirty (30) days, and Licensee failed to meet its burden in justifying an untimely appeal. Therefore, the *nunc pro tunc* appeal is dismissed.

O R D E R

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed as untimely.

Licensee has paid the fine in the amount of two hundred dollars ($200.00).

It is hereby ordered that Licensee's Restaurant Liquor License No. R-19117 remains revoked as of June 13, 2011.

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Board Secretary